IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6292 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

1 to 5 No

AYUB BABUSHA DIWAN

Versus

STATE OFGUJARAT

Appearance:

MR.HR PRAJAPATI for MR MM TIRMIZI for Petitioner

S.P.Dave, AGP for Respondent No. 1, 2, 3

CORAM : MR.JUSTICE H.R.SHELAT

Date of decision: 25/11/97

ORAL JUDGEMENT

1. With a view to detain the petitioner so as to deter him from carrying out his anti social-activities creating panic in the society, the Police Commissioner of the City of Ahmedabad passed the order of detention on 27th December, 1996, invoking the powers under Section 3(2) of the Gujarat Prevention of Anti Social Activities Act, 1985 (hereinafter referred to as `the Act'). Pursuant to that order, the petitioner has been arrested.

He at present under detention, by this application under Article 226 of the Constitution of India, challenges the legality and validity of the order.

2. The police received an information that the petitioner and his compeers were about to commit the offence of robbery in Saraspur area of Ahmedabad; The Police therefore, immediately raided and apprehended the petitioner. After, further inquiry, the Police could know that about eight complaints with different police stations were lodged against the petitioner. All those complaints were pertaining to the offences punishable under Section 379, 411 read with Section 114 I.P.Code and one complaint was with regards to the offence punishable under Section 392 I.P.Code. The complaints were lodged in the Gomatipur, Ellisbridge, Maninagar, Naranpura, police stations of the City of Ahmedabad and Makarpura, Gorva and J.P. Road Police Stations of the city of Baroda. During inquisition the Police could also see that the petitioner was carrying out nefarious activities. He was terrorising the people. The people were feelings insecured because of the impending danger to their safety. No one was ready to come forward and state against the petitioner because everyone was apprehending any wrong being done to them. No one was ready to invite death warrant. The petitioner by resorting to coercive measures and threatening the people with injury or death, extorting money and those who did not yield to his desire they were assaulted, beaten brutally and were made to succumb to his hankerings and ill will. Certain statements of the witnesses were recorded whereby the police also found that because of the atrocious activities of the petitioner, no one was happy. Everyone under the fear of violence, preferred to keep their lips tight. The Commissioner of Police found that the anti social activities of the petitioner were insurmountable and going berserk. Any action if taken under the general laws, would turn out to be the futile exercise and the petitioner would always find him unleashed . After cogitation the only way found fit in the circumstances to curb his activities and prevent him from further becoming unmitigated scoundrel was to pass the detention order and detain him in custody. The Police Commissioner, therefore, passed the impugned order, pursuant to which the petitioner is at present under detention.

3. Assailing the impugned order passed, the learned Advocate representing the petitioner made his submission based on different grounds. But, it is not necessary to deal with all those grounds as the application is likely

to be disposed of on the only ground going to the root of the case and it is about the exercise of the privilege not to disclose the particulars of the witnesses in the interest of those witnesses available under Section 9(2) of the Act.

4. It would be better if the law about the non-disclosure of certain facts is elucidated. Reading Article 22(5) of the Constitution of India, what becomes clear is that the grounds on which order of detention has been made are required to be communicated to the detenu and further an opportunity of making the representation against the order of detention is required to be given. The detenu is therefore required to be informed not merely factual inference and factual material which led to inference namely not to disclose the certain facts, but also the sources from which the factual material is gathered. The disclosure of sources would enable the detenu to draw the attention of the detaining authority in the course of his representation to the fact whether the factual material collected from such sources can be relied upon and used against him on the facts and circumstances of the case. Subject to the limitation mentioned in Article 22(6) of the Constitution of India and Section 9(2) of the Act the detaining authority is empowered to withhold such facts and particulars, the disclosure of which he considers to be against the public interest. The privilege of non-disclosure has to be exercised sparingly and in those cases where public interest dictating non-disclosure, overriding the public interest requiring disclosure. Hence the detaining authority must be fully satisfied on the basis of overall study that the apprehension expressed by the informant is honest, genuine and reasonable in the circumstances of the case. With a view to satisfy itself whether the fear of violence and consequential feelings of insecurity or apprehension of a wrong would be done to them at any time by the detenu by those making statement against the detenu is imaginary or fanciful; or an empty excuse or well founded for disclosing or not disclosing certain facts or particulars of those persons the authority making the order has to make necessary inquiry personally. What can be deduced from such Constitutional as well as legal scheme whereunder obligation to furnish the grounds and the duty to consider whether disclosure of any facts involved therein is against public interest or both vested in the detaining authority and not in any other. The authority passing the order of detention has to apply his mind and should itself be satisfied to the question whether or not the supply of the relevant particulars and materials would be injurious to the

public interest. No doubt, it is open to the authority to entrust this task of recording statement and inquiring into the matter to his subordinate or to any one found fit for the purpose but if he mechanically endorses or accepts the recommendation or opinion of his subordinate without application of mind and forming his just and independent opinion, the exercise of power would be vitiated as arbitrary. What is further required is the detaining authority must file his affidavit to satisfy the court that he had sincerely and honestly applied the mind for the bona fide exercise of the powers about disclosure and privilege regarding non-disclosure so that the court can examine rational connection between the ground disclosed or not disclosed in public interest. If no affidavit explaining the exercise of the power is filed, the court can infer against the detaining authority. If the affidavit is filed explaining the exercise of the power, the detenu may challenge the privilege exercised on the ground that the same is vitiated by factual or legal mala fides. For my such view, a reference to a decision in the case of Bai Amina, W/o Ibrahim Abdul Rahim Alla v. State of Gujarat and Others - 22 G.L.R. 1186 held to be the good law by the Full Bench of this court in the case of Chandrakant N. Patel v. State of Gujarat & Others 35(1) (1994 (1) G.L.R. 761. may be made.

5. In view of such law made clear in many cases and it is also held to be the good law in the case of Mohamad Ayub, the authority passing the detention order is under an obligation to furnish the material facts and particulars and the duty to consider whether the disclosure of any facts involved therein is against public interest or against the interest of the witnesses giving the statement are vested in the detaining authority and not in any other. When the privilege to withhold facts and particulars is exercised, the detenu cannot be permitted to say unless of course on mala fide that in the absence of such facts and particulars, he is not in a position to make any effective representation. Reading the order in question, the copy of which is produced at page 11, it is abundantly clear that the authority passing the detention order got himself satisfied assigning the task of enquiry to his subordinates. He has not personally satisfied whether or not to exercise the discretion and withhold the facts. It was submitted by the learned AGP Mr. Dave that the copy of the order produced at page 10 was suggestive of the fact that the authority was fully satisfied before passing the order, and that would indicate that the authority was also satisfied to exercise the power and

withhold the particulars. The contention cannot be accepted. Reading the order at page 10, what can be deduced is that the authority was fully satisfied for passing the order of detention; but there is nothing indicative of the fact that the authority applied his mind and felt satisfied that the privilege available vide Section 9(2) of the Act could justifiably be exercised. In the order produced at Page 11 hereinabove referred to in clear terms shows that without application of mind and personal satisfaction, the order simply accepting the report of other officer was passed. Further, the detaining authority has not filed his affidavit showing that there was application of mind and after being satisfied, the privilege was exercised. The contention of Mr.Dave, learned AGP therefore gains no ground to stand upon.

6. When the case about exercise of the privilege is not made out, it was incumbent upon the authority passing the order to supply all those particulars to the petitioner so that the petitioner could make effective representation but when all those particulars were not supplied, his right to make effective representation was marred. In view of the matter, the order in question can not be termed legal and valid; and the same is required to be quashed.

7. For the aforesaid reasons, the order of detention dated 27th December, 1996 is hereby quashed and the petitioner is ordered to be set at liberty forthwith if no longer required in any other case. Rule is accordingly made absolute.

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